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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Marriage of ALEXANDRA D'ABO and RICHARD D'ABO.	B216056 (Los Angeles County Super. Ct. No. BD079646)
ALEXANDRA D'ABO, Appellant, v. RICHARD D'ABO, Appellant.	

APPEAL from post-judgment orders of the Superior Court for the County of Los Angeles, Frederick C. Shaller, Judge. Affirmed.

Law Offices of Douglas A. Bagby and Douglas A. Bagby for Appellant Alexandra D'Abo.

Brandmeyer, Stanton & Dockstader, Brian K. Brandmeyer, John T. Bachmeyer, Janet E. Dockstader; Reuben, Raucher & Blum, Timothy D. Reuben, Stephen L. Raucher, Stephanie I. Blum and Michelle H. Chen for Appellant Richard D'Abo.

Appellant Alexandra D'Abo (Alexandra) and appellant Richard D'Abo (Richard)[1] separated in 1992, after a 15-year marriage, with a judgment of dissolution formally entered December 1, 1995. The parties modified the terms of the judgment by way of stipulation in April 2002. In May 2008, Alexandra filed an Order to Show Cause seeking, among other things, an order determining the amount of spousal support arrearages. The trial court ordered Richard to pay Alexandra over $90,000 in unpaid spousal support, modified Richard's future support obligations, and awarded attorney fees to Alexandra. Both Alexandra and Richard appealed the orders. Based on the record and applicable law, we affirm.

BACKGROUND

Alexandra and Richard were married on May 27, 1977. The marital standard of living was fairly high based on Richard's income which, in the latter years of the marriage, often approached one million dollars annually. Alexandra is well-educated, having obtained a graduate degree prior to marriage, and she is fluent in seven languages. However, Alexandra did not work during the marriage and has not been employed since the dissolution.

The dissolution judgment (Judgment) entered in December 1995 included, among many other provisions, that Richard would make spousal support payments to Alexandra. The spousal support order consisted of a base monthly support payment of $4,500 and a supplemental payment based on a calculation of 25 percent of Richard's "gross cash flow." The spousal support was not to exceed an average total monthly payment to Alexandra of $21,000. Richard was obligated to contribute an additional $5,000 annually ($416.67 per month) to Alexandra for her health insurance.

In May 2001, Richard filed an Order to Show Cause seeking to obtain a reduction in spousal support due to financial difficulties he had experienced, including

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[1] As is customary in dissolution proceedings, we refer to the parties by their first names for clarity of reference. (*In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 46, fn. 1.)

the loss of his $12,500 monthly income from EFX Corporation (EFX), an entity in which he also held an ownership interest. In 2002, the parties stipulated to the trial court issuing an order modifying the judgment and reducing the spousal support provisions (2002 Stipulated Modified Judgment). [2] Richard's monthly obligations to Alexandra were reduced to $2,250 in base support payments and $262 in monthly health insurance payments. The supplemental support payment was maintained at 25 percent of "gross cash flow" but only for sums in excess of $100,000. Additional language explained how "gross cash flow" was to be calculated.

When the parties separated, Alexandra moved to Paris, France, where she still resides. Since moving to France, Alexandra has experienced numerous health issues, including two heart attacks, a stroke, surgery on her carotid artery, and multiple surgeries on her right leg. Alexandra has difficulty walking or standing for long periods of time, has difficulty gripping with her hands, and requires in-home health care assistance.

In May 2008, Alexandra filed an Order to Show Cause seeking various orders from the trial court, including an order determining arrearages in support payments and attorney fees. At the time Alexandra's papers were filed, she was 70 years old and Richard was 51. Richard opposed Alexandra's request, contending there were no unpaid spousal support payments and he may have overpaid Alexandra. CPA Terry Hargrave was appointed to perform a forensic accounting to assist both parties in resolving the issues raised by Alexandra's Order to Show Cause. Ms. Hargrave prepared a written report and provided oral testimony at the evidentiary hearing held on January 29, 2009.

The court issued its order on February 5, 2009, finding that Alexandra was owed in excess of $90,000 in unpaid supplemental support payments through 2007. The court reserved for later determination the amount of supplemental support due, if

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[2] After execution by the parties in 2002, the stipulation was not filed with the trial court, but in February 2009, the court entered the order nunc pro tunc as of April 10, 2002, per agreement of the parties.

any, for 2008. The court increased the base monthly support to $3,500, reduced the percentage owed for supplemental support starting in 2009 to 15 percent of "gross cash flow," and awarded Alexandra $52,000 in attorney fees. Alexandra filed a motion for new trial, which was denied on April 1, 2009. The court took Alexandra's request for fees related to the motion for new trial under submission and thereafter issued an order on April 17, 2009, granting her additional fees of $25,000. Richard sought an order reconsidering the fee award. On May 18, 2009, the court granted the motion in part to the extent the court clarified the timing of when the additional fee payment was due but otherwise affirmed its prior order. These cross-appeals followed.

DISCUSSION

1. Alexandra's Appeal

A. The Trial Court Correctly Interpreted the Term "Actual Tax Obligations" in Calculating "Gross Cash Flow" in the Parties' 2002 Stipulated Modified Judgment.

The parties agree that the pertinent language in the Judgment and the 2002 Stipulated Modified Judgment is unambiguous and that the facts are undisputed on this issue. Accordingly, we exercise our independent review. (*Estate of Butler* (1988) 205 Cal.App.3d 311, 317 ["It is well established that in the absence of conflicting evidence the interpretation of a written instrument is one of law, and the reviewing court can give the writing its own independent interpretation"]; accord, *Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57.)

The language to be interpreted is contained in both the original Judgment entered in 1995, which incorporated the parties' marital settlement agreement, and the 2002 Stipulated Modified Judgment. "Marital settlement agreements incorporated into a dissolution judgment are construed under the statutory rules governing the interpretations of contracts generally." (*In re Marriage of Iberti* (1997) 55 Cal.App.4th 1434, 1439.) Because there are two related instruments that constitute parts of "substantially one transaction," we construe the writings together. (Civ. Code, § 1642.) Alexandra's assignment of error pertains solely to the court's interpretation

of the language related to the method of calculating "gross cash flow" for purposes of determining supplemental support payments.

The 2002 Stipulated Modified Judgment requires Richard to pay Alexandra spousal support including 25 percent of his "gross cash flow" in excess of $100,000. Alexandra contends that the trial court incorrectly interpreted the term "gross cash flow," erroneously allowing Richard to exclude significant income, which in turn deprived Alexandra of spousal support to which she was entitled. The dispute arose because in each of the years from 2004 to 2008, Richard received distributions from Apogee Electronics (Apogee), a subchapter S corporation. (The parties agree that Richard's income from Apogee is taxed like partnership income and refer to Apogee as a partnership.) The parties also agree that the Apogee distributions, when added to Richard's salary and other sources of income, resulted in Richard having "gross cash flow" in excess of $100,000 in 2004 to 2008. Apogee distributed to each partner each year only the amount needed to pay income taxes, assuming the total of federal and state taxes would be 45 percent of the income attributable to that partner's share of profits each year. [3]

In each year from 2004 to 2007, Richard received significant tax benefits from the carryover of a $2 million net operating loss he had incurred before 2000. The net operating losses carried over in 2004 to 2007 reduced the amounts of money Richard actually paid in state and federal income tax. Thus, he did not need the entire amount of his distributions from Apogee in those years to pay his taxes on income attributable to Apogee. For example, Ms. Hargrave, the forensic accountant, testified that in 2004, Richard's income tax liability for partnership income was $140,000, but because of the net operating loss, the amount of taxes he paid in 2004 attributable to partnership income was only $14,856. Alexandra contends that Richard could only deduct $14,856 in calculating the 25 percent of "gross cash flow" that he owed her in 2004.

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[3] The remaining profits were retained in Richard's capital account and not distributed. Alexandra acknowledged in her opening brief that she permitted Richard to avoid paying spousal support on the portion of the net income of the partnership which was not distributed to Richard.

There were significant differences between Ms. Hargrave's calculation of tax liability on partnership income and the amounts that Richard actually paid for the years 2005 through 2008, as well.

We must decide whether it is reasonable to construe "gross cash flow" to exclude (1) the taxes Richard *actually paid* on his partnership distributions, or (2) the tax obligations *attributable to Richard's* partnership income. Paragraph 11(b) of the Judgment defines "gross cash flow" in pertinent part to include "cash, property or perquisites received by [Richard] from whatever source including, but not limited to, those sources identified in Family Code § 4058. 'Gross cash flow' is not intended to include simply a 'paper profit' represented by, for example, appreciation in the value of securities in the absence of a sale or exchange."

Paragraph 8.1(ii) of the 2002 Stipulated Modified Judgment expressly incorporates Paragraph 11(b) of the Judgment. It modifies the original language, in pertinent part, by adding the $100,000 floor to Richard's obligation to pay Alexandra 25 percent of "gross cash flow;" and it also provides that partnership distributions to Richard shall be included "*only to the extent such distributions exceed the actual federal and state income tax obligations of [Richard] attributable to the income of said partnership*." (Emphasis added). Alexandra contends this means Richard can deduct from a partnership distribution only the amount of taxes he actually paid to the state and federal government. Richard contends this means he can deduct from a partnership distribution the actual tax obligations attributable to that partnership.

"'Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id*., § 1639.) The "clear and explicit" meaning of these provisions, interpreted in their "ordinary and popular sense," . . . [§ 1644] controls judicial interpretation. (*Id*., § 1638.)'" (*Bay Cities Paving & Grading v. Lawyers' Mutual Ins. Co*. (1993) 5 Cal.4th 854, 867.) Moreover, "'[c]ourts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists.' [Citation]

. . . '[*L*]*anguage in a contract* must be construed in the context of that instrument as a whole, and in the circumstances of that case, and *cannot be found to be ambiguous in the abstract*.' [Citations.]" [4] (*Ibid*.)

With these guiding principles in mind, we turn to a review of the pertinent language. The parties concede they were aware, at the time the 2002 Stipulated Modified Judgment was negotiated, drafted, and executed, that Richard had a net operating loss available to him based on prior business losses that would allow him to reduce his personal income tax liability for a number of years. [5] Presumably, the parties understood that Richard's actual state and federal income tax payments, in any given year, would be based on total income from all sources (not just "gross cash flow") minus any appropriate deductions, as with any ordinary individual taxpayer. There is nothing in the record to suggest that the parties lacked general knowledge of such basic tax principles. If the parties had wanted to ensure that Richard could not use the net operating loss, or any other tax deduction for that matter, to reduce any applicable income stream available to establish "gross cash flow," we assume they would have clearly so indicated in the 2002 Stipulated Modified Judgment, just as they did in specifically identifying the sources of income that would be considered in the first instance.

The language the parties chose provides that distributions to Richard from the applicable partnerships like Apogee would not be included in calculating "gross cash flow" except to the extent the particular distribution exceeded the "actual federal and state income tax obligations of [Richard] *attributable to the income of said partnership*." (Emphasis added.) This phrasing is unequivocally precise in tying the phrase tax "obligations" to the specific partnership that generates the distribution to

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[4] Despite Alexandra's argument to the contrary, the trial court's order reflects the correct application of the law pertaining to interpretation of contracts.

[5] In Alexandra's responsive brief, she unequivocally states that "it is undisputed that the parties knew about the [net operating loss] at the time they entered into the Stipulation of 2002."

Richard. While it does use the word "actual" to define tax obligations, the remainder of the sentence must be read in conjunction therewith.

This language cannot reasonably be construed as meaning that any distribution from an applicable partnership will be included if it exceeds the actual income taxes *paid* by Richard. Inferring that the parties intended the phrase to mean income taxes paid would necessarily mean taxes paid on account of *all* of Richard's sources of income, not just that attributable to the specific partnership that provided the distribution. Richard's tax obligations are based on all his sources of income, deductions and credits. His tax liability is not calculated separately for each separate source of income. Alexandra's proffered interpretation is unreasonable and renders the phrase "attributable to the income of said partnership" meaningless.

The fact that Richard, in preparing his tax returns, was able to apply various deductions, including the net operating loss, to reduce the amount of taxes he ultimately paid, does not mean that he received distributions from Apogee in excess of his tax obligations "attributable to" Apogee within the meaning of the parties' agreement. Alexandra argues that the Apogee distributions exceeded what Richard ultimately paid in actual taxes relative to all income sources, without explaining how they exceeded his tax obligations "attributable" to Apogee, which is the relevant inquiry. The trial court's interpretation of this language was not erroneous, and we reject Alexandra's assignment of error on this ground.

B. There Was No Abuse of Discretion in the Modification of Spousal Support.

Alexandra next contends that the trial court abused its discretion in reducing her overall spousal support when all statutory factors indicated that an increase in support was warranted. "'The propriety of an order modifying spousal support "rests within the trial court's sound discretion. So long as the court exercised its discretion along legal lines, its decision will not be reversed on appeal if there is substantial evidence to support it. [Citations.]" Reversal requires a clear showing of abuse of discretion.'" (*In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 412.) Alexandra has not

demonstrated that the trial court abused its discretion in granting in part her request for modification of support.

"In exercising discretion whether to modify a spousal support order, 'the court considers the same criteria set forth in [Family Code] section 4320[6] as it considered when making the initial order.'" (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 899.)[7] With a modification order, the court must find a material change of circumstances. """Change of circumstances means a reduction or increase in the supporting spouse's ability to pay and/or an increase or decrease in the supported spouse's needs. [Citations.] It includes all factors affecting need and the ability to pay."""" (*Ibid*.) The change of circumstances may only be considered from the date of the last order. (*In re Marriage of Biderman, supra,* 5 Cal.App.4th at p. 412.) In this case, the last order was the 2002 Stipulated Modified Judgment.[8]

Alexandra contends that the trial court could only consider her request for an *increase* in support and could not issue an order *reducing* support, which she contends it did. Even if a changed circumstance is shown that warrants a change in spousal support, "'it does not ensure that a modification will be granted.'" (*In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 78.) And the court is not constrained to modify

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6 All further statutory references are to the Family Code unless otherwise indicated.

7 In making a permanent spousal support order, "the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320 . . . . 'The issue of spousal support, including its purpose, is one which is truly personal to the parties.' [Citation.] In awarding spousal support, the court must consider the mandatory guidelines of section 4320. [Footnote omitted.] Once the court does so, the ultimate decision as to amount and duration of spousal support rests within its broad discretion . . . . [Citation.] 'Because trial courts have such broad discretion, appellate courts must act with cautious judicial restraint in reviewing these orders.' [Citation.]" (*In re Marriage of Kerr* (1999) 77 Cal.App.4th 87, 93.)

8 The rule applies equally to stipulated orders. (*In re Marriage of Hentz* (1976) 57 Cal.App.3d 899, 901-902.)

spousal support only in the manner requested by the parties. The court must consider all relevant factors and make a determination if modification is appropriate under all the circumstances (*ibid*.), keeping in mind the "goal of accomplishing substantial justice for the parties . . . ." (*In re Marriage of Smith* (1990) 225 Cal.App.3d 469, 481.)

We are not persuaded that the trial court reduced Alexandra's spousal support. In the 2002 Stipulated Modified Judgment, Richard's support obligations included monthly base support of $2,250, an additional monthly payment for health insurance of $262, and supplemental support calculated as 25 percent of "gross cash flow" from identified income in excess of $100,000. Because the supplemental support payments were always intended to be a percentage of various fluctuating income sources, the parties refer to this aspect of the spousal support scheme as the "Smith/Ostler component," based on *In re Marriage of Ostler & Smith* (1990) 223 Cal.App.3d 33, which affirmed an award of support based on a percentage of discretionary bonuses to be earned by the supporting spouse in the future as opposed to a set dollar amount. (*Id*. at pp. 41-42.) We will maintain the same designation for clarity of reference.

The court's February 5 order *increased* Alexandra's base monthly support to $3,500, maintained her additional monthly payment of $262 for health insurance, and reduced only the percentage of the Smith/Ostler component for supplemental support from 25 percent to 15 percent. However, Alexandra is not clear how this necessarily equates with a "reduction" in spousal support. She does not explain how a mere reduction in the percentage actually operates to reduce her support, given the increase in Richard's annual income as reflected in the Hargrave report, and which Alexandra strenuously argues is on the rise.

The parties' 1995 Judgment at paragraph 11(i), which was not altered by the 2002 Stipulated Modified Judgment, clearly provides that in no event shall Alexandra be owed in excess of "an average of $21,000 per month." The parties expressly agreed to a cap on spousal support owing to Alexandra. Given the increase in Richard's annual income evidenced by the record, Alexandra still has the potential, even with the

reduction of the percentage, to obtain well in excess of the base monthly support and arguably up to the monthly cap agreed to by the parties. The trial court reasonably exercised its discretion based on a review of the record concerning Richard's ability to pay in light of his current debt load and expenses.

Alexandra is correct to point out that, in ordering or modifying support, the trial court is required to consider all of the factors enumerated in section 4320. The court need only do so "to the extent they are relevant to the case before it." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302.) Several of the section 4320 factors simply do not apply here. Alexandra also overstates reliance on factors she deems important, primarily the duration of the marriage, the marital standard of living, and Richard's increased ability to pay. "The marital standard of living is relevant as a reference point against which the various statutory guidelines are to be weighed [citation], but it is not in and of itself sufficient to sustain an award of permanent support. [Citation.] Likewise, a disparity in income, standing alone, does not justify an award of spousal support." (*In re Marriage of Zywiciel* (2000) 83 Cal.App.4th 1078, 1081; accord, *In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1521.) The relevant criteria set forth in section 4320 are all to be considered, with each factor "balanced in light of the others." (*In re Marriage of Wilson* (1988) 201 Cal.App.3d 913, 920.)

The court's order acknowledges consideration of section 4320 and cites the primary determinative factors in its decision as being Alexandra's age,[9] poor health and financial condition, Alexandra's inability to become self-supporting, her loss of assets through poor investments, Richard's relative good health, younger age and ability to pay, the length of time since separation, Richard's no longer having a net operating loss against income, and the finding that Alexandra "grossly overstated" her reasonable needs. The record establishes that as of the 2008 tax year, Richard will

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9 The court's order of February 5 contains a typographical error as to Alexandra's age, i.e., it erroneously identifies her age as of 2009 as 61 when she was in fact 71 at that time.

have a much greater tax burden and also is presently having difficulty making payments on his substantial debt. Such evidence is relevant in assessing Richard's ability to pay. Moreover, the length of time since the separation (18 years) is also a relevant factor for the court to consider in attempting to arrive at an equitable and just decision. It was not an abuse of discretion for the court to consider these factors in reaching its decision on modification.[10]

In reviewing the court's order we "must assume the trial court made whatever findings are necessary to sustain its order." (*In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 238.) Moreover, we must "accept as true all evidence tending to establish the correctness of the findings of the trial court, resolve all conflicts in the evidence in favor of the prevailing party, and indulge all legitimate and reasonable inferences to uphold the judgment. [Footnote omitted.] Our review is not limited to only those facts the trial court mentions in its statement of decision but, like any appellate review, extends to the entire record." (*In re Marriage of Schmir, supra*, 134 Cal.App.4th at pp. 49-50.)

On the issue of Alexandra's obligation to become self-supporting and failure to do so after 18 years since her separation from Richard, the trial court clearly found that given her health problems and age, there was no "realistic or reasonable chance" that Alexandra will ever become self-supporting. We therefore disregard Richard's argument on this point as it is beyond our scope of review. It is not our role to reweigh evidentiary matters and we will not do so. (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1531.)

The record supports the finding that Alexandra had failed to adequately substantiate her claimed expenses and the court's decision not to award a greater increase in base monthly support. Little in the record supports Alexandra's need for

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10 Richard correctly points out that a number of the cases relied upon by Alexandra concern erroneous decisions to terminate support and are not particularly helpful in analyzing the court's exercise of discretion below. Richard has not sought termination of support, and the court in fact clearly stated on the record that a discontinuation of support would be an "undue hardship" on Alexandra.

in-home health care in excess of $3,000 per month. Alexandra admitted that her request for $2,000 per month for dining out, $1,605 per month for new clothes, and $3,200 per month for entertainment, vacations and gifts were "proposed" numbers. When balanced against Alexandra's desire also to maintain an apartment at a cost in excess of $8,000 per month and seek necessary healthcare costs, the court reasonably made a determination not to consider all of Alexandra's claimed expenses in arriving at an increased amount of support. (*In re Marriage of Weinstein* (1991) 4 Cal.App.4th 555, 569 [trial court not required to accept supported spouse's claimed expenses "as trial courts must 'remain ever vigilant to exaggeration and falsification'"].)

Alexandra also raises the point that "Richard has no obligation to pay any supplemental support for the calendar year 2009 until October 30, 2010. . . ." However, this is not a change ordered by the trial court. In the 2002 Stipulated Modified Judgment, at paragraph 8.4, the parties modified the original paragraph 11(e) to provide that supplemental support shall be due "without interest" by October 30 of the following calendar year. This is the due date for supplemental support agreed to by Alexandra in the 2002 Stipulated Modified Judgment. The court did not make a determination that supplemental support shall be paid in one annual lump sum; the parties did. There can be no finding that the court committed error by failing to alter the agreed-upon annual due date for supplemental support.

The court's ruling was consistent with legal authority and is supported by substantial evidence in the record. We find no abuse of discretion.

2. Richard's Cross-Appeal.

A. The Trial Court Correctly Determined That Richard's Payments as Guarantor on the EFX Debt Were Not Proper Deductions from "Gross Cash Flow."

Richard contends that the court misconstrued the express language of the Judgment by finding that the payments he made pursuant to a personal guaranty of debt related to EFX should not be deducted to calculate "gross cash flow." The parties agree that the relevant language is unambiguous and properly deemed a question of

law for this court to review independently. (*Estate of Butler*, *supra*, 205 Cal.App.3d at p. 317.)

Paragraph 11(b) of the Judgment provides in relevant part that "[f]or purposes of this Judgment, 'gross cash flow' is intended to include cash, property or perquisites received by [Richard] from whatever source including, but not limited to, those sources identified in . . . § 4058." Section 4058(a)(2) includes "business income," defined as: "Income from the proprietorship of a business, such as gross receipts from the business *reduced by expenditures required for the operation of the business*." (Emphasis added.)

The trial court determined the parties' agreement only incorporated section 4058 for a limited purpose and "only includes reference to 'sources of income' listed in that code section, not the definitions of income in the subdivisions of that section." The trial court further explained its ruling by stating that the 2002 Stipulated Modified Judgment only identified one type of deduction that would be allowed in defining "gross cash flow," and that was "actual tax obligations" and not other types of deductions or business expenditures.

Richard contends this was an impermissible interpretation of the relevant language. We do not have to decide this question, however, because even if we were to interpret the Judgment as incorporating all of section 4058, we would uphold the trial court's decision. The trial court correctly concluded that Richard's debt payments as a guarantor of obligations related to EFX were not proper deductions from "gross cash flow."

The court in *Asfaw v. Woldberhan* (2007) 147 Cal.App.4th 1407, addressed the definition of "business income" under section 4058. There, the trial court had allowed a father to deduct depreciation costs as an "expenditure" from business income he had derived from various rental properties. The *Asfaw* court explained that a "proprietor cannot operate a business without inventory, without employees, without paying taxes, and so forth. A business can be conducted without a deduction for depreciation. *We conclude that 'operation of the business' means ordinary and necessary business*

expenditures directly related to or associated with the active, day-to-day conduct of a business." (*Id*. at p. 1425, emphasis added; cf. *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1222 [interpreting "operating expenses" in article IV, section 7.5 of the California Constitution, "in a limiting manner"; "something less than any and all expenses that may be attributed to an activity, business, or entity"; "expenses that have something of an immediate connection to the conduct of the ongoing or day-to-day activities of a business or entity"].)

We conclude, consistent with the above authorities, that the phrase "expenditures required for operation of the business," as contained in section 4058, subdivision (a)(2), and incorporated into the parties' agreement, is not broad enough to include payments Richard made as an individual guarantor on debts incurred by EFX. EFX did not incur or make the subject payments; rather, Richard undertook them personally. He contracted to obligate himself as a separate individual obligor vis-à-vis certain creditors of EFX for debt incurred by the corporation. "A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." (Civ Code, § 2787.) Such payments do not equate with a business owner incurring operating expenses to run the day-to-day operations of a business.

The debt obligations that Richard personally undertook on behalf of EFX were known at the time of the drafting of the 2002 Stipulated Modified Judgment. It is reasonable to assume that if Richard had wanted it clear that any business income he received from EFX would be reduced by any payments he made on his personal guaranty of EFX debt in calculating his "gross cash flow," he would have negotiated for such language to be in the agreement. The only reasonable inference is that he agreed to assume the burden of paying down all debts associated with EFX, including his personal guaranty obligations. It cannot fairly be assumed that Alexandra would have expected such sums to be used to reduce "gross cash flow" based solely on incorporation of section 4058 into the parties' agreement with no other explicit language directly on point.

Richard further argues that Alexandra agreed to the calculation of the income numbers used by Ms. Hargrave and that those numbers included business income from Richard's consulting business minus the expenditures for operating that particular business. He contends that it would be inconsistent to interpret the language that allows those deductions for one source of business income but disallows deductions for the EFX income. The argument is not persuasive. Richard is correct that the parties agreed to his income totals as defined and related to calculating "gross cash flow" for the years 2004 through 2007. The record includes supporting documentation for those agreed-upon numbers, which shows that, for purposes of defining business income from Richard's consulting business, relevant business expenditures were deducted as itemized on Schedule C of his tax returns. The expenditures allowed for the consulting business are classic operating-type expenses, such as equipment rental and utilities. To the extent such expenses were used to reduce Richard's business income attributable to his consulting business, operated as a sole proprietorship, that would appear proper under section 4058 and consistent with the language of the parties' agreement incorporating that section. However, the consulting business expenses in no way equate with Richard's payment, as an individual, of debt obligations he undertook personally as a guarantor of EFX.

In re Marriage of Blazer (2009) 176 Cal.App.4th 1438 (*Blazer*) does not compel a different result. There, the supporting husband had one source of income, a limited liability company, which both spouses' experts admitted was undercapitalized. (*Id.* at p. 1444.) The husband testified that certain monies were not actually taken by him as income but reinvested as capital contributions in order to diversify operations and ensure continued survival of the LLC. (*Id*. at p. 1447.) The *Blazer* court held that the "trial court acted within its discretion in attributing the reinvested funds to the business instead of husband." (*Id*. at p. 1448.)

Blazer does not support Richard's argument that the debt payments he made on a personal guaranty are business expenditures. As a guarantor, Richard was responsible for such payments even if EFX stopped operating, assuming the principle

obligation had not otherwise been extinguished. Such payments cannot be equated with the operating-type expenses envisioned by section 4058. And, there is no indication that the husband in *Blazer* had expressly agreed in the marital settlement to assume all debt associated with the LLC, as Richard did as to EFX. We therefore find that the trial court reached the correct outcome in disallowing such payments to be deducted from the calculation of "gross cash flow."

B. The Award of Attorney Fees to Alexandra Was Within the Trial Court's Discretion.

Finally, Richard contends that the court's award of an additional $25,000 in attorney fees to Alexandra in connection with her motion for new trial was an abuse of discretion. Richard argues the amount awarded was not "just and reasonable" under the circumstances because the motion was unsuccessful and it reflected Alexandra's unreasonably excessive litigation tactics. "Awards of attorney fees are reviewed for abuse of discretion." (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1166; accord, *In re Marriage of Lynn* (2002) 101 Cal.App.4th 120, 133.) We do not find that the court exceeded the bounds of its discretion.

Section 2032 provides in relevant part: "(a) The court may make an award of attorney's fees and costs under Section 2030 or 2031 where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties. [¶] (b) In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320." "The purpose of a section 2030 fee award is to ensure that the parties have adequate resources to litigate the family law controversy and to effectuate the public policy favoring 'parity between spouses in their ability to obtain legal representation.'" (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 827.)

Richard urges this court to focus on the lack of legal merit to Alexandra's motion for new trial, which was denied in its entirety, and her excessive litigation tactics. In dissolution proceedings, a need-based award may be ordered in favor of a losing party. "[T]here is no requirement that attorney fees be awarded only to prevailing parties, as they may be awarded against a prevailing party in family law proceedings." (*In re Marriage of Hublou* (1991) 231 Cal.App.3d 956, 966, italics omitted.)

Moreover, we cannot say that Alexandra's motion was patently without merit. The court denied Richard's request for sanctions, stating there was no showing the motion for new trial was pursued in bad faith or that Alexandra's conduct in bringing the motion frustrated the "policy of the law to promote settlement . . . [and] reduce the cost of litigation." The trial court is in the best position to assess the conduct of counsel, to determine credibility and to judge the value, if any, of services rendered by counsel appearing before them. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) Further, the record reveals that Alexandra made a colorable argument in favor of her claim that the court erred with respect to modifying the overall spousal support plan. The fact that we find the court did not commit error on this issue does not render Alexandra's motion frivolous.

Richard cites a statement in the trial court's order that "the amount and scope of litigation was unreasonably excessive for the complexity of the issues involved, particularly after the expert was chosen and rendered her joint expert report." But that statement is not specifically directed to either party. While the court is entitled to consider a party's litigation tactics when rendering a fee award (*In re Marriage of Drake*, *supra*, 53 Cal.App.4th at p. 1167), the record below does not establish that Alexandra's litigation conduct warranted an outright denial of fees.

As for Richard's argument that there was insufficient evidentiary support for the court to make a proper determination, it must fail as well. """It is well established in California that, although the trial court has considerable discretion in fashioning a need-based fee award [citation], *the record must reflect that the trial court actually*

exercised that discretion, and considered the statutory factors in exercising that discretion." [Citation.]'" (*In re Marriage of Lynn, supra*, 101 Cal.App.4th at p. 134.) In addition to considering what is "just and reasonable" under the circumstances, "the trial court is required to consider certain factors developed in the case law for fixing the amount of a reasonable need-based fee award, including: the nature of the litigation; its difficulty; the amount in controversy; the skill required and employed in handling the litigation; the attention given; the success of the attorney's efforts; the attorney's learning and experience in the particular type of work demanded; the intricacies and importance of the litigation; the labor and the necessity for skilled legal training and ability in trying the cause; and the time consumed." (*In re Marriage of Braud, supra*, 45 Cal.App.4th at p. 827, fn. 30.)

While Alexandra did not present billing statements in her moving papers, she did provide a supporting declaration of counsel identifying his hourly rate ($600), his experience in family law and an estimate of the initial amount of time expended on the motion for new trial. Thereafter, in the reply papers, Alexandra submitted a supplemental declaration of counsel along with billing statements reflecting work performed subsequent to the February 5 order. The showing was sufficient to apprise the court of the nature and amount of work performed in connection with the motion and related litigation undertaken after the February 5 order. (*Mardirossian & Associates, Inc. v. Ersoff* (2007) 153 Cal.App.4th 257, 269.)

This case is not similar to *In re Marriage of Keech* (1999) 75 Cal.App.4th 860. There, the supported spouse did not submit documentation in support of her fee request but merely attested to the amount of her most recent bill from counsel. (*Id*. at p. 869.) The trial court nonetheless ordered the supporting husband to pay $25,000 in fees to the wife -- an amount that just happened to approximate the fees the husband indicated he had paid to his own counsel. "Acknowledging the fact that it appears husband's own fees were represented to have approximated or exceeded $25,000 does little more than allow informed speculation that the court decided to require husband to pay at least as much for wife's attorney fees as he did for his own. That is not the

standard by which the court was to determine the amount of the award." (*Id*. at pp. 869-870.) The reviewing court reversed the fee award, holding that the record did not support a finding that the trial court had considered the relevant statutory factors and had therefore abused its discretion. (*Id*. at pp. 870-871.) In contrast, the record here is sufficient to support the trial court's fee award. Under the relevant standard of review, we find no abuse of discretion.

DISPOSITION

The orders of February 5, 2009, and April 17, 2009, are affirmed. Each party is to bear their own costs on appeal.[11]

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

We concur:

BIGELOW, P. J.

RUBIN, J.

[11] This order is not intended to alter or modify in any way the trial court's award to Alexandra of $12,500 of fees and costs on appeal on May 18, 2009, as that order was not appealed and is not before us.